# No. 15,602

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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WILLIAM EVANS and JOSEPHINE EVANS,
*Appellants,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

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**On Appeal from the United States District Court for the Northern District of California, Southern Division.**

## BRIEF FOR THE APPELLEE.

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### JURISDICTION.

On March 13, 1957 an Indictment in four counts was filed against appellants in the United States District Court for the Northern District of California, Southern Division, charging the appellants jointly with violation of the narcotic laws and conspiracy. (R. 3-6.)

Count one charged concealment and facilitating the concealment and transportation of two ounces of heroin on March 4, 1957 at San Francisco, California

in violation of Title 21 United States Code, Section 174.

Count two charged selling, dispensing and distributing, not in or from the original stamped package, of two ounces of heroin on March 4, 1957, at San Francisco, California, in violation of Title 26 United States Code, Sections 4704 and 7237.

Count three charged the concealment and facilitation of concealment and transportation of 22 grains of marihuana without payment of the transfer tax imposed by Section 4741(a), Title 26 United States Code on March 4, 1957, at San Francisco, California, in violation of Title 26 United States Code, Sections 4744 and 7237.

Count four charged the defendants with conspiracy to sell and distribute, not in and from the original stamped packages, quantities of heroin in violation of Sections 4744 and 7237, and to conceal and facilitate the concealment of quantities of heroin which had been imported into the United States contrary to law in violation of Section 174 of Title 26 United States Code. (R. 3-6.)

Appellants waived trial by jury and thereafter appellant William Evans was found guilty on all four counts, and sentenced to imprisonment for 40 years and fined $5,000 on count one; imprisonment for 40 years on count two; to run concurrently with the sentence imposed on count one; imprisonment for ten years and fined $1,000 on count three, the imprisonment to run concurrently with the imprisonment on

count one; and imprisonment for 10 years and fined $5,000 on count 4, the imprisonment to run consecutively to that imposed on count one. Total imprisonment imposed was 50 years, and total fine $11,000. (R. 6-9.)

Appellant Josephine Evans was found guilty on counts 1, 2 and 4, count three being dismissed by the court at the close of the government's case. She was sentenced to imprisonment for five years on each count to run concurrently. (R. 23-24.)

Motions for judgment of acquittal and for new trial were denied on June 18, 1957 and notice of appeal was filed on June 21, 1957, subsequent to the imposition of judgment as to appellant William Evans on June 20, 1957, but prior to imposition of judgment on Josephine Evans on July 9, 1957. (R. 9, 21-25.) An amendment to notice of appeal was filed on July 12, 1957 subsequent to the imposition of judgment on appellant Josephine Evans. (R. 25.)

Jurisdiction was conferred on the District Court by Title 18 United States Code, Section 3231, and jurisdiction of this court is invoked under Title 28 United States Code, Sections 1291, 1294.

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## STATEMENT OF THE CASE.

Appellants were jointly charged and convicted in count one of the indictment of knowingly concealing and facilitating the concealment and transportation

of two ounces of heroin; in count two of the indictment of the sale of two ounces of heroin not in or from the original stamped package; and in count four of the indictment of conspiracy to sell, dispense and distribute heroin in violation of Title 26 United States Code, Sections 4744 and 7237, and to conceal and facilitate the concealment of heroin which had been imported into the United States contrary to law in violation of Title 21 United States Code, Section 174. In addition, appellant William Evans was convicted on the third count of the indictment of concealing and facilitating the concealment and transportation of 22 grains of marihuana in violation of Title 26 United States Code, Sections 4741(a), 4744 and 7237. Count three was dismissed as to appellant Josephine Evans. (R. 3-9, 23-24, 172-173.)

In their statement of the case and in Appendix B to their brief, appellants have set forth in detail a resume of the evidence in the order of its introduction at the trial. Accordingly, we will here merely summarize sufficient facts to inform the court of the general nature of the case.

Appellants have lived together as man and wife off and on since 1950 or 1951, although the record does not show whether they were ever legally married to each other. (R. 177-178.) During the period involved herein they operated Oliver's Restaurant at 1569 Ellis Street, San Francisco, California. (R. 65, 176.) Appellant William Evans resided in a room above Oliver's Restaurant at the time of the trial, but in addition spent some of his nights at 953 Broderick Street, San

Francisco, California with Mildred Moore, who was the mother of one child by the appellant. (R. 176, 177.)

Appellant William Evans was twice previously convicted of violations of the Federal Narcotic Laws in Illinois and Michigan, and of grand larceny, the exact dates and offenses not being shown. (R. 178-179, 190.) He testified in his own defense. (R. 176, 194.) Appellant Josephine Evans did not take the stand.

The sequence of events began on February 27, 1957 with a telephone call made by Sine Gilmore to appellant William Evans at Oliver's Restaurant. (R. 32-38, 94-95, 180.) Gilmore telephoned from the office of the Federal Bureau of Narcotics. The telephone call was monitored by an agent who listened in on an extension. (R. 32-35.) Gilmore, a special employee of the Bureau of Narcotics, had met both appellants on the street some place at different times about six weeks to two months previously. (R. 78-79.) Gilmore was himself a user of narcotics and had been twice convicted of felonies for violation of the narcotic laws of the State of California. (R. 77.) He had first received narcotics from appellants Josephine or William Evans about one or two weeks prior to March 4, 1957. (R. 79-80.) According to the testimony of the agent who monitored the telephone call on February 27, 1957 Gilmore told appellant William Evans "My man from Stockton is in town again, the same one I did that thing for last week, and he wants another one just like it. I have the money with me now. Can I come to see you?" Appellant William Evans

replied that he was busy and that Gilmore would have to see "the boss" tomorrow. (R. 35.)

Gilmore's version of the conversation was "something about somebody coming from Stockton; that wanted something, some stuff, and I think he told me I would have to see the boss." (R. 96.) Gilmore understood "stuff" to mean narcotics and the "boss" to refer to appellant Josephine Evans. (R. 96.)

On two or three times prior to March 4, 1957 Gilmore had given money to appellant Josephine Evans for the purchase of narcotics and had conversations with appellant William Evans prior to these transactions. (R. 97.) He denied that these conversations were when he was buying any "stuff". (R. 97.) At approximately one P.M. on February 27, 1957 Gilmore met appellant William Evans at Oliver's Restaurant and had a conversation with him. No money or narcotics passed between them at this time. (R. 38, 53, 59.)

On March 1, 1957 Gilmore was supplied with $350.00 in government funds, and upon being searched was found to have $350.00 of his own money, making a total of $700.00. (R. 39, 87-90.) He was also equipped with a Schmidt transmitting device and under surveillance of federal narcotic agents he proceeded to Oliver's Restaurant, where he remained from approximately 3:50 to 4:30 P.M. During this period he was out of the sight of narcotic agents during an interval of only three or four minutes when he went to the rear of the restaurant and then reappeared with appellant Josephine Evans with whom

he had a conversation. Upon rejoining the narcotic agents he was searched, and the $700.00 was missing. (R. 39-40, 62-63.) Gilmore testified he gave the $700.00 to appellant Josephine Evans for narcotics he had previously received on consignment. (R. 87-90, 101-102, 120-122.)

About 7 P.M. on the evening of March 1, 1957 Gilmore was again equipped with a Schmidt transmitting device, and again he drove to the vicinity of Oliver's Restaurant under the surveillance of narcotic agents. (R. 41-42.) Shortly after parking across the street from the cafe, appellant William Evans entered Gilmore's car and they drove to the Chicago Pool Hall. Appellant Evans remarked that he was "leery" of the panel truck; that it had been parked there all afternoon. (R. 64, 97-98.) A panel truck containing the receiving device for the Schmidt transmitter and a narcotic agent were parked directly across the street from Oliver's Restaurant during the period from 2:00 P.M. to 7:45 P.M. on March 1, 1957. (R. 61-66.)

About midnight on March 1, 1957 Gilmore returned to Oliver's Restaurant, went inside for a moment and returned to his car with appellant William Evans. As the car was leaving appellant William Evans was heard to say: "You don't see what's going on around you very well." "There has been heat all around the place tonight. There was heat in the restaurant and in the Booker T. Washington, and we are going to have to let things cool for a few days, and you will have to get in touch with me later." Gilmore said, "I don't have any money or anything else. What am

I to do?" Appellant Evans replied, "Don't worry about it. I will take care of you." (R. 43-45, 120, 121.)

Three days later, at approximately 11:00 A.M. on March 4, 1957 Gilmore met appellant Josephine Evans by pre-arrangement at a vacant lot in the vicinity of Page and Pierce Streets, San Francisco. Appellant Josephine Evans pointed to a board in the lot, and Gilmore, following her pointed directions, looked under the board and found a newspaper wrapped package which, upon examination, was found to contain two ounces of heroin. (R. 29, 46-51, 80-84, 103-104, Exhibits 1 and 3.)

Gilmore testified that he had given Josephine Evans one hundred and some odd dollars of his own money at Oliver's Restaurant that morning in part payment for the heroin. (R. 86-90, 101, 110-111.) He denied giving any money to appellant William Evans for the heroin in exhibit 1, or having any conversation with him concerning the money paid over, or discussing narcotics with appellant William Evans the night before the payment was made, or receiving any narcotics from him at a prior time. (R. 71-93.) However, Gilmore stated that he "might have" on occasion discussed narcotics with appellant William Evans, but that "he never have told me he would give me them to sell." (R. 93.) He stated that every time he spoke to appellant William Evans about narcotics "he would refer more or less to the boss." (R. 124.)

**The Marihuana Count.**

On March 5, 1957, at about 4:10 to 4:20 A.M. appellant William Evans was arrested at 953 Broderick Street pursuant to a warrant of arrest issued by the United States Commissioner for violation of the narcotic laws. (R. 126-130.) A search of the premises was made incident to the arrest and 22 grains of marihuana were found concealed behind the carpet on the top steps of the stairs inside the dwelling place. (R. 133-135.) The marihuana was contained in a coin wrapper or envelope of the same type used to contain the heroin. (R. 217-218, Exhibit 3.) At the time of his arrest appellant William Evans was attired only in underwear, and had just arrived at the apartment five minutes before. (R. 183.) The apartment was also occupied by a woman who identified herself as Mildred Evans, and stated that she was married to appellant William Evans, and that they lived together, and had children there. (R. 128, 142.) Mildred Evans testified that her real name was Mildred Moore and that she had never used the name Mildred Evans, but that an automobile was purchased in that name. (R. 195.) Appellant William Evans testified that he put the name "Mildred Evans" on a 1957 Chrysler automobile that he bought for her. (R. 191.) Mildred Moore was questioned about the marihuana at the time it was found, and she disclaimed ownership. (R. 143, 154.) Appellant William Evans was questioned at the same time, and the following conversation ensued:

"Q. What is that?

A. What is what?

Q. It looks like marihuana to me.
A. Is it mine?
Q. I don't know.
A. Where did you find it?
Q. I found it in the house by the top riser of the carpet.
A. Well, then, will my answer make any difference as far as your obtaining a conviction in this case?
Q. It might.
A. Well, I will try to figure out what you have against me first before I answer that." (R. 135-136.)

On voir dire examination by appellant's counsel, the arresting agent testified that appellant William Evans had been under surveillance for a period of time; that he had gone to the address at which he was arrested; that he had had conversations with an informer of the Bureau of Narcotics; that the informer had driven him to that address after these conversations; that the informer had told the witness that he had had narcotic transactions with William Evans indirectly; that the informer had conversations with appellant William Evans, and ordered narcotics from him, and that Josephine Evans had made the deliveries of narcotics to the informer. (R. 131.)

Mildred Moore testified that appellant William Evans did not live with her and the children, one of whom was fathered by appellant, but that he visited her once or twice a week. (R. 196.) Appellant William Evans stated that he had spent only three or four nights at 953 Broderick Street since January 10. (R. 177.)

Appellant William Evans testified that he had received a telephone call from Sine Gilmore on February 27, 1957, but denied discussing narcotics at that time. (R. 180.) He understood that Gilmore wanted to sell narcotics, and four or five days previously Gilmore had asked him about narcotics; that he wanted $2,000 worth of heroin for the man from Stockton. (R. 180-181, 192-193.)

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**QUESTIONS PRESENTED.**

1. Whether the conviction of appellant Josephine Evans on count 4 should be affirmed when the sentence imposed was identical to and concurrent with that imposed on counts 1 and 2 from which she does not appeal.

2. Whether the evidence was sufficient to convict appellant William Evans on all counts of the indictment.

a. Was the evidence sufficient to establish appellant's complicity as a principal on the substantive offenses, counts 1 and 2.

b. Was the evidence sufficient to establish a conspiracy.

c. Was the evidence sufficient to establish appellant's possession of marihuana found in the apartment where he was arrested.

d. Was evidence improperly admitted against appellant.

## ARGUMENT.

### I.

### THE EVIDENCE SUPPORTS THE VERDICT AS TO EACH COUNT.

**A. Josephine Evans.**

Appellant Josephine Evans apparently concedes the sufficiency of the evidence against her on counts one and two of the indictment charging the substantive offenses. (App. Br. 22, 24, 30.) She presses her appeal only as to the conviction of conspiracy charged in count four. However, the sentences imposed on counts 1, 2 and 4 were identical and were made to commence and to run concurrently with each other. (R. 23-24.)

> "It is well settled that upon conviction and sentence under each of several counts in one indictment, if the sentences are for equal terms and concurrent, a failure of proof as to one or more counts does not constitute reversible error when the evidence suffices as to one good count."
>
> *Kramer v. United States,* 147 F.2d 202 (C.A. 9th);
>
> *Toliver v. United States,* 224 F.2d 742 (C.A. 9th);
>
> *Norwitt v. United States,* 195 F.2d 127 (C.A. 9th);
>
> *United States v. Trenton Potteries,* 273 U.S. 392.

**B. William Evans.**

Appellant William Evans has filed a statement of nine points upon which he intends to rely. (R. 227-228.) In his brief these are consolidated into four

points. (App. Br. 21, 22.) The single thread running throughout all of appellant's brief appears to be related to the sufficiency of the evidence to establish the conspiracy, to establish appellant's role as a principal under counts one and two; to establish possession or control of the marihuana under count three. Collaterally, he argues that evidence was improperly admitted against him, and that the court erroneously denied his judgment of acquittal at the close of the government's case.

Initially, appellant lectures this court on the presumption of innocence and doctrine of reasonable doubt which prevail during trial, and prior to a judgment of guilty. He ignores the well established principles of appellate review frequently reiterated by this court that it will indulge in all reasonable presumptions in support of the ruling of a trial court and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

*Henderson v. United States,* 143 F.2d 681 (C.C.A. 9th);

*Pasadena Research Laboratories v. United States,* 169 F.2d 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

*Norwitt v. United States,* 195 F.2d 127 (C.C.A. 9th);

*Bell v. United States,* 185 F.2d 302, 308 (C.C.A. 4th);

*Gendelman v. United States,* 191 F.2d 993 (C.A. 9th);
*Barcott v. United States,* 169 F.2d 929, 931 (C.A. 9th), certiorari denied, 336 U.S. 912.

Neither is this court concerned with the weight of the evidence or the credibility of the witnesses. All that is required is that there be some substantial evidence in the record indicating appellant's guilt.

*Glasser v. United States,* 315 U.S. 60;
*Gage v. United States,* 167 F.2d 122 (C.A. 9);
*United States v. Socony Vacuum Oil Co.,* 310 U.S. 150, 254;
*C-O-Two Fire Equipment Co. v. United States,* 197 F.2d 489, 491 (C.A. 9).

By these established standards of appellate review, it is clear that the evidence is sufficient to require affirmance of the judgment.

**1. The Conspiracy.**

Appellants concede that the four overt acts alleged in the indictment were established by the evidence during the course of the trial. They contend, however, that none of the acts bore any relationship to the conspiracy or were in furtherance thereof. (App. Br. 29, 30.)

Title 18 United States Code Section 371 requires an overt act to make the conspiracy complete, but the overt act need not be a crime and may within itself be absolutely innocent.

*Smith v. United States,* 92 F.2d 460 (C.A. 9).

Nor is it essential that the indictment show the overt acts necessarily aided in the commission of the substantive offense as long as it is alleged that they were done in furtherance of the conspiracy.

*Felder v. United States,* 9 F.2d 872 (C.A. 2);
*United States v. Eisenminger et al.,* 16 F.2d 816, 820.

Overt acts must be considered with other evidence and attending circumstances in determining whether a conspiracy exists, and where they are of such a character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the act or acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged.

*United States v. Crowe,* 188 F.2d 209, 213 (C.A. 7);
*United States v. Morris,* 225 F.2d 91, 95, cert. den.

Certainly, the conversations between appellant William Evans and the narcotic purchaser Gilmore, and the subsequent passage of money and delivery of narcotics between Gilmore and appellant Josephine Evans are the type of acts which usually and necessarily are done pursuant to a scheme and plan between the conspirators. Secrecy and concealment are essential features of a successful conspiracy, and it would be a rare situation where any single act could be pointed to as demonstrating the existence of a conspiracy.

Appellant William Evans contends that the only crime committed was the delivery of heroin at the vacant lot, and that the record is silent with respect to his connection with such delivery. (App. Br. 31.) But, the act of one conspirator in the prosecution of the enterprise is taken as the act of all, and can be admitted into evidence and considered against all the conspirators.

*Brown v. United States,* 150 U.S. 93;
*Logan et al. v. United States,* 144 U.S. 263.

So far as the conspiracy count is concerned, as appellant himself points out, it is the unlawful combination, confederacy and agreement between two or more persons that is the gist of the action, and the corpus delicti charged.

*Tingle v. United States,* 38 F.2d 573 (C.A. 8).

Admittedly, the evidence to establish the conspiracy was circumstantial, but conspirators seldom sign articles of partnership in crime which may thereafter be conveniently put into evidence by the prosecution.

*United States v. Crowe,* supra.

Indeed, there is an undisputed line of cases demonstrating that evidence of an express agreement among alleged co-conspirators is unnecessary.

*United States v. Morris,* supra.

The conspiracy must be inferred from the things actually done. The clear inference from the record is that appellant William Evans negotiated with prospective customers for the sale and delivery of nar-

cotics, and arranged with his co-conspirator Josephine Evans to make the actual deliveries. Indeed, an accusatory statement to this effect went undenied by appellant William Evans. (R. 157.)

It is a matter of inference for the trier of the fact to determine the existence of the agreement constituting the conspiracy from the fact that those charged worked together in furtherance of the unlawful scheme.

*Levey v. United States,* 92 F.2d 688 (C.A. 9th).

In most cases, the proof of the agreement is the evidence of what the conspirators did in execution of such agreement.

*Culp v. United States,* 131 F.2d 93 (C.A. 8th);
Citing *Feigenbutz v. United States,* 65 F.2d 122 (C.A. 8th).

Once having conceded the proof of the overt acts, the only question remaining is whether there was evidence of the unlawful agreement. The evidence clearly establishes the necessary concert of action and community of purpose of appellants. The roles each played in the conspiracy tend to establish the necessary existence of such an agreement. The opportunity was present, for they were in intimate contact at Oliver's Restaurant and lived together as man and wife while in San Francisco. (R. 177.) Appellant William Evans was intimately familiar with traffic in narcotics, having "used about every kind at one time or another" (R. 193), and having been twice con-

victed of federal narcotic violations.[1] The established modus operandi of appellant was to "have a woman out in front" (R. 157) and the evidence here reflects faithful adherence to this method of procedure. This type of secrecy and concealment is of the nature referred to by the court in *Blumenthal v. United States,* 332 U.S. 539, 557, wherein it said:

> "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all of its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity."

The essential nature of the plan here was to traffic in illicit narcotics, and the connection of appellant William Evans was to arrange the transactions while that of appellant Josephine Evans was to handle the deliveries. The single threads of evidence standing alone present no discernible picture, but woven together throughout the record and considered as a whole they make a complete tapestry depicting the scheme.

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[1]Senator Daniels' Subcommittee estimated that the accused furnished between 70% and 80% (elsewhere 80% to 90%) all of the narcotics in certain cities. Narcotic agents testified that when this statement was made to appellant after arrest he did not deny it. (R. 158.)

In *Stoppelli v. United States,* 9 Cir., 1950, 183 F.2d 391, 393, certiorari denied, 1950, 340 U.S. 864, this court said:

> "It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences other than guilt could be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. [Case cited.] In the cited case, Judge Prettyman pertinently observes, 'If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.' 160 F.2d at page 233. [Case cited.]"

Quoted with approval in *Ferrari v. United States,* 244 F.2d 132. (C.A. 9.)

**2. The Case of Ong Way Jong et al. v. United States.**

Appellant relies heavily on *Ong Way Jong et al. v. United States,* 245 F.2d 392. (C.A. 9.) In that case, there was no testimony as to whether Ong was engaged in any criminal activity, nor any circumstances from which an accessoryship could be legally inferred. As this court pointed out in *Parente v. United States,* No. 15,361, decided November 12, 1957:

> "In the *Ong Way Jong* case a mere association of parties was shown; here appellant is shown to be a contact man bringing buyer and seller together. What other rational conclusion can be drawn from the facts?"

Similarly, the only logical inference supported by the facts here is that appellant William Evans was the contact man with appellant Josephine Evans as the "front."

The court below considered the *Ong* case during the motion for judgment of acquittal at the close of the government's case. Appellant criticizes the court's colloquy as giving "short shrift" to what he refers to as the rule of the *Ong* case. He has adopted the conventional strategy of lifting comments out of context, and fails to point out that the court's comments were made only after summation of the facts by the prosecution and the defense.

**3. Entrapment.**

Appellants suggest that the narcotic agents unsuccessfully attempted to entrap William Evans into the commission of the offense. No such defense was raised in the court below. Moreover, his argument is not based on fact. He relies upon testimony of Gilmore at page 106 of the record, but fails to direct the court's attention to Gilmore's further testimony on recross examination, completely refuting any suggesting of entrapment at page 124:

> "Q. Mr. Gilmore, isn't it true that the government agents in this case tried to persuade you to make a deal with William Evans?

A. What kind of a deal are you talking about?
Q. To buy narcotics from him. They tried to get you to do that, isn't that true?
A. No.
Q. The government's agents never tried to get you to do that?
A. No."

Thus, the testimony presented above completely refutes any suggestion of entrapment.

The burden of proof wherein entrapment is an issue in the case rests upon the defendant, and where the issue was not raised below, and the record does not support appellant's belated contention that he was entraped into the commission of the offense, the burden has not been met.

*Capuano v. United States,* 9 F.2d 41 (C.A. 1st).

**4. The Substantive Counts.**

Appellants contend that there was no proof of agency or aiding and abetting to support the conviction. (App. Br. 45-49.) They point out that the indictment did not allege "aiding and abetting." (App. Br. 48.)

Appellants were tried as principals under the provision of Title 18 United States Code, Section 2.[2]

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[2] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717."

It is well established that if one procures another to commit an illegal act, he is equally guilty. In *Kramer v. United States,* 147 F.2d 202 (C.A. 9) the defendant procured another to import narcotics hidden in her dress. Kramer did not have the narcotics in his possession, and was not charged with "assisting" in bringing them across the line. The evidence was held sufficient to convict.

Likewise, in *Aeby v. United States,* 206 F.2d 296 (C.A. 5) the evidence showed that defendant lived in a house in which narcotics were found pinned to his wife's nightgown. Defendant was absent at the time, but the evidence was held sufficient to establish that it was also in his possession.

Lack of direct proof of receipt, concealment, sale or transportation of narcotics is not fatal when the circumstances in proof lead to the unescapable conclusion that the defendant was instrumental in the dealings. *United States v. Pinna,* 229 F.2d 216 (C.A. 7). The cases are innumerable involving convictions of defendants who have attempted to shield themselves from detection by the use of "fronts" or go-betweens. The court was entitled to draw an inference from the facts that appellant William Evans had arranged to be screened by appellant Josephine Evans, and to find him guilty as a principal.

## II.

### THERE WAS NO ERROR OF ADMISSION OF EVIDENCE AGAINST BOTH APPELLANTS.

1. Appellant William Evans asserts that testimony concerning the delivery of heroin at the vacant lot on March 4, 1957 was improperly admitted as to him for the reason that it was never connected up. He contends that the evidence should have been stricken as to him. (App. Br. 53.)

However, appellant made no motion to strike the evidence at the time it was offered, or at any other time prior to raising the issue in his brief. He cannot now complain that a motion never sought was not granted. The precise nature of appellant's objection to the court below is not clear, but we assume that it was on the ground that the evidence was hearsay as to him, although the term hearsay was not used. (R. 46.) Of course, when a party excepts to the admission of testimony, he is bound to state his objection specifically, and on appeal is confined to the objection so taken. If he has assigned no ground for exception, a mere objection cannot avail him.

*Olender v. United States,* 237 F.2d 859, 866 (C.A. 9);

*Bank of Italy v. F. Romeo & Co.,* 287 Fed. 5, 9 (C.A. 9).

Assuming, however, that appellant's objection was a proper one, it went only to the order of proof, and it is well established that the order of proof in a

criminal case is within the sound discretion of the trial court.

*Chadwick v. United States,* 141 Fed. 225, 241 (C.A. 6th);

*Hoeppel v. United States,* 85 F.2d 237, 242 (C.A.D.C.).

Moreover, error in admitting testimony as to guilt, before the proof of corpus delicti, is cured when the subsequent testimony sufficiently establishes the corpus delicti.

1 *Wharton's Criminal Evidence* 12th Ed., Section 17.

The court was warranted in receiving evidence on the assurance it would be connected up at a later time. Subsequent testimony did, in fact, establish that appellant William Evans conspired to effect a delivery of the narcotics in question, and the evidence was properly considered against him.

Appellant has failed to comply with Rule 18(2)(d) of this court requiring him to set forth "the full substance of the evidence admitted or rejected."

2. Appellant William Evans next complains that the court overruled his motion to strike testimony of the witness Gilmore concerning the identity of the person named Bill who answered the telephone call on February 27, 1957. (App. Br. 54.) However equivocal Gilmore's answer may have been to the question objected to, only the weight and not the admissibility of the testimony was affected. Moreover, appellant chose to testify in his own defense, and in response

to questions by his own counsel, he admitted that he had received the telephone call in question. (R. 180.) As the Supreme Court pointed out in *United States v. Calderon,* 348 U.S. 160, 164, the reviewing court can seek corroborative evidence in the proof of both parties where, as in this case, the defendant introduces evidence in his own behalf after his motion for acquittal has been overruled. Cf. *Bogk v. Gassert,* 149 U.S. 17.[3]

3. Appellant finally contends in Section II, Parts 3 and 4 of his brief that the exhibits of heroin and marihuana were improperly admitted against him. (App. Br. 55-56.) In his objections below he referred to lack of independent proof of the corpus delicti.[4]

The limitation of proof prior to establishing the corpus delicti is normally confined to the admissibility of confessions, and admissions of accomplices, rather than to physical evidence. See e.g. *Smith v. United States,* 348 U.S. 147, 152-155. In any event, appellant's argument is but one facet of his claim of insufficiency of evidence, and thus need not be separately discussed under this heading.

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[3]By introducing evidence, the defendant waives his objections to the denial of his motion to acquit. *Lii v. United States,* 198 F.2d 109; *Leeby v. United States,* 192 F.2d 331; *Gaunt v. United States,* 184 F.2d 284; *Mosca v. United States,* 174 F.2d 448; *Hall v. United States,* 83 U.S. App. D.C. 166, 168 F.2d 161. His proof may lay the foundation for otherwise inadmissible evidence in the Government's initial presentation. *Ladrey v. United States,* 81 U.S. App. D.C. 127, 155 F.2d 417, or provide corroboration for essential elements of the Government's case, *United States v. Goldstein,* 168 F.2d 666; *Ercoli v. United States,* 76 U.S. App. D.C. 360, 131 F.2d 354. (*United States v. Calderon,* 348 U.S. 160, 164, footnote 1.)

[4]Appellant again fails to comply with Rule 18(2)(d) of this court.

## III.

### THE MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED AT THE CLOSE OF THE GOVERNMENT'S CASE.

Appellants under Section III of their brief attack the sufficiency of the evidence to warrant the denial of a motion for judgment of acquittal. (App. Br. 57-61.) We will not burden this court with further discussion of the facts, but merely point out that this court has held that a motion for judgment of acquittal must be granted *only* if, as a matter of law, reasonable minds, as triers of fact, *must* be in agreement that reasonable hypothesis other than guilt can be drawn from the evidence.

*Elwert v. United States,* 231 F.2d 928 (C.A. 9).

The evidence being sufficient to warrant an inference of guilt, the motion was properly denied.

*Brandon v. United States,* 190 F.2d 175 (C.A. 9);

*Gendelman v. United States,* 191 F.2d 993 (C.A. 9), certiorari denied, 342 U.S. 909.

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## IV.

### THE EVIDENCE ESTABLISHED APPELLANT WILLIAM EVANS' POSSESSION OF MARIHUANA.

Appellant William Evans' final attack is on the sufficiency of the evidence under count three of the indictment to establish that he had possession of the marihuana or of the premises on which it was found. (App. Br. 62-63.) The marihuana was found concealed behind a carpet at 953 Broderick Street, where

appellant was arrested. (R. 133-135.) Appellant was dressed only in his underwear and stated he had just gone to bed. (R. 128, 183.) The apartment was also occupied by Mildred Moore, the mother of appellant's child, who first stated she was married to appellant and that they lived together. (R. 128.) At the trial she denied having lived as appellant's wife and denied that appellant resided at her address. (R. 197-198.) She had previously known Evans in Chicago and had lived at 953 Broderick Street not quite two months. (R. 196.) Appellant testified that he spent three or four nights at the apartment since January 10, 1957 (R. 177), and Mildred Moore estimated he had visited there about once or twice a week, but had never spent the night there. (R. 196.) Appellant had been observed entering the apartment while under surveillance by agents of the Bureau of Narcotics. (R. 131.)

Mildred Moore denied ownership of the marihuana. (R. 143, 154.) Appellant's response to questions concerning the contraband were characterized as "fencing." (R. 135-136, 219.) He did not deny possession of the marihuana, but neither did he affirm it. (R. 219.)

When questioned concerning marihuana he asked if the answer would make any difference in obtaining a conviction, and upon being told that it might, he said, "Well, I will try to figure out what you have against me first before I answer that." Later, when told that Mildred Moore was to be booked for joint possession of the marihuana he said, "Well, you don't want to book her for that." (R. 136.) These are not

the responses of an innocent bystander, but considered in their context suffice to support an inference of reluctant admission of ownership of contraband.

Section 4744, Title 26 *United States Code,* as amended July 18, 1956, provides in part:

> "Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by Section 4741(a)."

The statute does not define what is meant by possession. It has been said that it must be a knowing possession.

*United States v. Maghinang,* 111 F. Supp. 760 (D.C. Del.);

*Guevara v. United States,* 242 F.2d 745 (C.A. 5);

Cf. *Francis v. United States,* 239 F.2d 560 (C.A. 10).

This court has stated in *Pitta v. United States,* 164 F.2d 601 (C.A. 9), in connection with the presumption provision of the Jones-Miller Act (Title 21 *United States Code,* Section 174):

> "Possession of any sort is sufficient to raise the presumption and to place upon the accused the burden of explaining the possession to the satisfaction of the jury. (Citing cases.) The aim of the statute is to stamp out the existence of narcotics in this country, except for legitimate med-

ical purposes. (Citing.) It follows that the evidentiary consequence flowing from proof of possession was here operative."

To the same effect is *Ferrari v. United States,* 169 F.2d 353 (C.A. 9).

Obviously, the marihuana was owned by someone. Mildred Moore, in appellant's presence denied ownership. Appellant did not. There was no showing that anyone else ever visited the apartment, despite speculation to this effect in appellant's brief. If the marihuana was not Mildred Moore's, it must of necessity have been possessed by appellant William Evans.

The government proved that appellant failed to produce the order form required by Section 4742. (R. 163-164.) The presumption then became operative against him. Taken together with all the other circumstances of the case, the unexplained possession of marihuana was sufficient to fairly establish appellant's guilt.

The possession of marihuana by appellant was, at the most favorable view of the evidence to him, constructive or circumstantial rather than direct, but as the Court of Appeals for the Seventh Circuit pointed out in *United States v. Pinna,* 229 F.2d 216, 218:

> "We know of no reason, however, why possession proven by circumstantial evidence should be treated any differently from possession proven by direct evidence."

See also

*United States v. Pisana,* 193 F.2d 355, 360 (C.A. 7).

## CONCLUSION.

For the reasons set forth above the judgments as to each appellant should be affirmed.

Dated, San Francisco, California,
November 29, 1957.

LLOYD H. BURKE,
United States Attorney,
JOHN LOCKLEY,
Assistant United States Attorney,
*Attorneys for Appellee.*

**(Appendix Follows.)**

# Appendix.

## Appendix

### STATUTES.

*Title 18 U.S.C. 371—Conspiracy Statute:*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy," each shall be punished as provided by law.

*Title 21 U.S.C. 174:*

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

*Title 26 U.S.C. 4704(a):*

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

*Title 26 U.S.C.Section 4741—Imposition of tax:*

"(a) Rate.—There shall be imposed upon all transfers of marihuana which are required by section

4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax."

*Title 26 U.S.C. 4744—Unlawful possession:*

"(a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)——

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained. Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and

demand by the Secretary or (h)is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a). As amended July 18, 1956, c. 629, Title I, § 101, 70 Stat. 567."

*Title 26 U.S.C. 7237(a):*

"(a) Violation of law relating to opium and coca leaves and marihuana.—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 nor more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2(c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section

1, chapter 202, of the act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553 of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subsection."